Supreme Court, U.S.
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No. 70-351

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN WENDELL DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION TO DISPENSE WITH THE PRINTING OF PETITION FOR CERTIORARI AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

ERWIN N. GRISWOLD,
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After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of transporting obscene motion picture films in interstate commerce, in violation of 18 U.S.C. 1465. The parties stipulated that the films were obscene, so that the only issue at trial was whether petitioner transported the films in interstate commerce. The Court of Appeals for the Fourth Circuit affirmed *per curiam* on December 22, 1970. The petition for a writ of certiorari was filed on June 25, 1971, and is substantially out of time under Rule 22(2).

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There is, in any event, no merit to the petition. The films were sold by petitioner in Norfolk, Virginia, to two undercover police officers. At the time of the transaction, petitioner told the officers that he had purchased the films in New York and was selling them along the eastern seaboard; he was driving an automobile bearing New York license plates (see Pet. 4). The government introduced additional evidence concerning the interstate transportation issue, showing that petitioner made other sales of obscene films in Virginia and Tennessee, and that in the course of consummating one such sale he told the purchaser that he was from New York and obtained his films there. A check which he received as payment from that purchaser cleared through a New York bank (see Pet. 4–6).

The errors asserted are that there was insufficient evidence corroborating petitioner's extra-judicial statement to the police officers to establish interstate transportation; that the corroborating evidence was improperly admitted; and that the trial court incorrectly refused to instruct the jury that corroborative evidence was necessary for a conviction.

The evidence summarized above provides ample basis for the jury's conclusion that petitioner transported the films interstate. And in the circumstances of this case, the objections regarding corroboration are wide of the mark. Unlike the situation in *Smith* v. *United States*, 348 U.S. 147, petitioner's statements here were not made after the offense to officials charged with investigating the possibility of wrong-

doing. Instead, petitioner's representations were made as part of the *res gestae* of the offense, to persons whom he knew only as purchasers of his wares. These were not the type of extrajudicial statements for which corroboration is required. Compare *Smith* v. *United States, supra,* 348 U.S. at 152, 153, 155; see *Warszower* v. *United States,* 312 U.S. 342, 347–348.

Moreover, there was no error here even on petitioner's theory. Corroboration, if required, was sufficiently provided by the evidence of other transactions and of the out-of-state license on petitioner's automobile. Compare *Smith* v. *United States, supra,* 348 U.S. at 156. Since this evidence was probative of the interstate nature of petitioner's business, as well as the continuing course of his unlawful conduct, it was properly admitted.

Finally, the trial judge correctly declined to give an instruction on corroboration. Corroboration was not an issue during the trial, and was first raised by defense counsel in his summation to the jury. Counsel did not object to the jury instructions until after they had been read and the jury had retired to the jury room. In this circumstance, the judge properly determined that petitioner's belated request for further instructions, which would necessitate recalling the jury, would unduly emphasize this issue. See II R. 103–104, 107–108, 159–161.[1]

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[1] The cases cited by petitioner as in conflict with the decision here (see Pet. 9) are distinguishable. Unlike the present case, they involved statements for which corroboration admittedly was required, and they turn on the particular corroborating facts proved, which were not of the quantum which the government established here.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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